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Effective Criminal Appellate Advocacy: Seeking Reversal by Concurrent Collateral and Direct Attacks in the Appellate Court

By GERALD Z. MARER†*

Introduction—The Need for Improved Criminal Appellate Advocacy

CALIFORNIA provides as a matter of right¹ for an appeal from criminal convictions. In fiscal year 1973-74, 3,300 such appeals were filed in the California courts of appeal.² Of these appeals, 2,455 involved court-appointed counsel.³ In the same year, the California Supreme Court appointed counsel in twenty-two⁴ of the forty-four criminal appeals⁵ which it decided to hear. A comparable volume of such appeals confronts courts both in other states and in the federal system.⁶

† The author wishes to dedicate this article to his father, Jack W. Marer, of the Nebraska Bar.

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1. Compare CAL. PEN. CODE §§ 1237, 1237.5, 1538.5(m) (West 1970) (appeals from superior courts) with *id.* § 1466(2) (appeals from inferior courts).

2. JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF CALIFORNIA COURTS 72 (1975) [hereinafter cited as 1975 JUDICIAL COUNCIL REPORT].

3. *Id.* at 19. An indigent appellant is constitutionally entitled to court-appointed counsel on appeal in California, since the appeal is a matter of right. See note 108 *infra*.

4. See 1975 JUDICIAL COUNCIL REPORT, *supra* note 2, at 19.

5. See *id.* at 71. Owing to the abolition of the death penalty and the automatic appeal therefrom to the supreme court, there were no direct criminal appeals to the supreme court in 1973-74. 1975 JUDICIAL COUNCIL REPORT, *supra* note 2, at 69. Also filed with the supreme court were 757 original criminal proceedings, which constituted eighty percent of all original proceedings. *Id.*

6. See, e.g., Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A.J. 569 (1975); Swygert, *Bench and Bar Work Together in the Seventh Circuit*, 61 A.B.A.J. 613 (1975).

In light of these statistics, it is not surprising that the quality of representation by counsel in criminal appeals has varied widely.⁷ This inconsistency is due in part to the uncertainty of appellate attorneys concerning the standards to which they will be held.⁸ Although an abundance of literature⁹ and numerous cases¹⁰ discuss the standards for measuring the adequacy of criminal trial counsel, no articles have dealt specifically with standards for measuring the adequacy of criminal appellate representation,¹¹ despite the emergence in recent years of decisions which have held constitutionally inadequate representation by appellate counsel.¹² This situation indicates the need for delineation of guidelines for effective criminal appellate representation.

7. See *People v. Echstrom*, 43 Cal. App. 3d 996, 1002-03, 118 Cal. Rptr. 391, 395 (1974), (inadequate counsel at trial); *In re Greenfield*, 11 Cal. App. 3d 536, 89 Cal. Rptr. 847 (1970); see also *United States ex rel. Johnson v. Vincent*, 370 F. Supp. 379 (S.D.N.Y. 1974). The court in *Greenfield* stated that "the routine work of an appellate court discloses wide variations in the quality of professional services supplied by litigation lawyers In representing indigent criminal appellants, many court-appointed attorneys display praiseworthy capabilities and zeal. Others are saved from disaster by the care of the court and its research staff." *In re Greenfield*, 11 Cal. App. 3d at 544, 89 Cal. Rptr. at 851. See also *People v. Peter*, 55 Ill. 2d 443, 303 N.E.2d 398 (1973). One commentator has stated: "judges are increasingly troubled by the growing number of instances of poor legal representation encountered even in our nation's highest courts." Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A.J. 569 (1975). The Administrative Office of the California Courts describes appellate counsel in the following terms: "Assigned [appellate] counsel are frequently inexperienced, and the level of representation furnished by assigned counsel is uneven and frequently only marginally adequate The result of these deficiencies is not merely to give unequal representation to appellants, but to impose added work upon the courts of appeal and upon the office of the Attorney General." 1975 JUDICIAL COUNCIL REPORT, *supra* note 2, at 19-20.

8. The standards of representation are the same for appointed and retained appellate counsel. See *Nickols v. Gagnon*, 454 F.2d 467, 471 (7th Cir. 1971), *cert. denied*, 408 U.S. 925 (1972); *People v. Scobie*, 36 Cal. App. 3d 97, 111 Cal. Rptr. 600 (1973); *Abraham v. State*, 228 Ind. 179, 91 N.E.2d 358 (1950). See also *West v. Louisiana*, 478 F.2d 1026, 1032 (5th Cir. 1973) (sixth amendment right to adequate counsel applies to a defendant who retains his own counsel as well as to defendants with state appointed counsel).

9. See, e.g., Bazelon, *Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973); Bines, *Remedying Ineffective Representation in Criminal Cases: Departures for Habeas Corpus*, 59 VA. L. REV. 927 (1973) [hereinafter cited as Bines]; Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973).

10. See Kaus & Mallen, *The Misguiding Hand of Counsel—Reflections on Criminal Malpractice*, 21 U.C.L.A.L. REV. 1191, 1197 n.14 (1974) (California cases discussing adequacy of trial counsel).

11. For a discussion of the functional advocacy role of counsel in the criminal process, see Palmer, *Implementing the Obligation of Advocacy in Review of Criminal Convictions*, 65 J. CRIM. L.C. & P.S. 267 (1974).

12. See *United States ex rel. Johnson v. Vincent*, 370 F. Supp. 379 (S.D.N.Y.

The nature of appellate proceedings¹³ and the type of work required in a criminal appeal afford counsel more time for study and reflection¹⁴ and present less risk of surprise than he experiences in trial proceedings. The scope of tactical and strategic decisions in an appeal is more confined.¹⁵ Counsel has numerous guides to the mechanics of both brief writing and oral argument,¹⁶ and to the potential issues to be considered on every criminal appeal.¹⁷ Thus, the general standards for

1974); *Smotherman v. Beto*, 276 F. Supp. 579, 589 (N.D. Tex. 1967); *In re Greenfield*, 11 Cal. App. 3d 536, 89 Cal. Rptr. 847 (1974). There may be other cases in California, but in 1973-74, only 7% of the criminal decisions of the courts of appeal were published. 1975 JUDICIAL COUNCIL REPORT, *supra* note 2, at 82. See generally, Kanner, *Unpublished Appellate Opinions—Friend or Foe*, 48 CALIF. ST. B.J. 387 (1973).

13. An appeal is limited to the "four corners" of the clerk's transcript and reporter's transcript. See *People v. Merriam*, 66 Cal. 2d 390, 396-97, 426 P.2d 161, 165, 58 Cal. Rptr. 1, 5 (1967). The skills required, which include study of the record, research, brief writing, and oral argument, are taught in most law schools in moot court programs and appellate advocacy courses.

14. Counsel's time is spent primarily studying the record, researching, thinking, and brief writing. Extensions of time to file briefs are available, and such extensions are routinely granted. See CAL. SUP. CT. & CTS. OF APP. R. 43. As one court has put it: "After all, appellate counsel is blessed with the gift of hindsight as he leisurely picks over the carcass of a dead lawsuit." *People v. Eckstrom*, 43 Cal. App. 3d 996, 1001, 118 Cal. Rptr. 391, 394 (1974). The required information on procedure is readily available. See generally SUP. CT. & CTS. OF APP. R. 1-76; COMMITTEE ON CONTINUING EDUCATION OF THE BAR, STATE BAR OF CALIFORNIA, 2 CALIFORNIA CRIMINAL LAW PRACTICE §§ 20.1-162 (1969) [hereinafter cited as CALIFORNIA CRIMINAL LAW PRACTICE]; B. WITKIN, CAL. CRIM. PROCEDURE §§ 680-717 (2d ed. 1963 & Supp. 1973) [hereinafter cited as WITKIN].

15. See *People v. Eckstrom*, 43 Cal. App. 3d 996, 118 Cal. Rptr. 391 (1974). The court in *Eckstrom* noted that appellate counsel, unlike trial counsel, is not confronted with "minute to minute and second to second strategic and tactical decisions." *Id.* at 1001, 118 Cal. Rptr. at 394.

16. See, e.g., COMMITTEE ON CONTINUING EDUCATION OF THE BAR, STATE BAR OF CALIFORNIA, CALIFORNIA CIVIL APPELLATE PRACTICE (1966); Couch, *Writing the Appellate Brief*, 17 PRAC. LAW. 27 (1971); Magidson, *Preparation and Argument of the Criminal Appeal*, 62 J. CRIM. L.C. & P.S. 173 (1971).

The rules of court suggest appropriate contents for appellate briefs. CAL. SUP. CT. & CTS. OF APP. R. 13, 15, 37. See also *People v. Feggans*, 67 Cal. 2d 444, 432 P.2d 21, 62 Cal. Rptr. 419 (1967). For a discussion of how appellate courts operate and how one is to adjust his brief writing and oral argument to differences in courts, see NATIONAL CENTER FOR STATE COURTS, THE CALIFORNIA COURTS OF APPEAL (1974); Kaufman, *Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094 (1974); Molinari, *The Decision Making Conference of the California Court of Appeal*, 57 CALIF. L. REV. 606 (1969); Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211 (1957).

17. See, e.g., CALIFORNIA CRIMINAL LAW PRACTICE, *supra* note 14, §§ 20.75-86 (1969) (itemization of grounds for reversal in recent United States Supreme Court and California Supreme Court decisions); WITKIN, *supra* note 14, § 738 (list of possible grounds for reversal); Zagel, *Supreme Court Review 1973*, 64 J. CRIM. L.C. & P.S. 379 (1973) (annual review of decisions of the United States Supreme Court); *The Supreme Court of California, 1972-1973, Criminal Law and Procedure*, 62 CALIF. L. REV.

representation by appellate counsel should be easier to delineate than those for trial counsel.¹⁸ Nevertheless, appellate counsel, concerned with the peculiarities of each individual appeal, must determine on a case by case basis what is required to discharge the constitutional duty owed to his client.

An appellate counsel's primary duty has been to seek reversal based on the record on appeal. Recent California decisions, however, illustrate that this practice of limiting review to the record on appeal may be inadequate. In appropriate cases, appellate counsel must investigate the entire case to determine whether there is evidence outside the record on appeal which might arguably have achieved a more favorable result for the defendant had it been presented at trial. Moreover, these decisions indicate that when such evidence exists, counsel should collaterally attack the conviction during the pendency of the appeal by filing a petition for an appropriate writ in the court in which the appeal is pending. One recent case, *People v. Lang*,¹⁹ suggests that such a duty of investigation currently exists. At the least, these recent opinions prepare the way for the establishment of such a duty.

This article will discuss, from a conceptual and practical standpoint, the duties of an attorney in a criminal appeal. The development of the constitutional standards of adequate appellate representation will be described, with emphasis on the recent cases indicating the need for requiring, in appropriate cases, an investigation beyond the record on appeal. The article will suggest procedures which can be used to meet this requirement, especially methods applicable to situations in which arguable grounds for reversal are found outside the record on appeal. It is hoped that this article will be a source of practical and useful information for the practicing attorney, will help improve the quality of appellate advocacy, and will contribute to the effective administration of justice.

309, 495-576 (1974) (annual review of decisions of the Supreme Court of California); *The United States Courts of Appeals: 1973-74 Term, Criminal Law & Procedure*, 63 GEO. L.J. 325 (1974) (an annual issue on the criminal case decisions of all federal courts of appeals by topic, showing grounds of reversal); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 1 (1974) (annual review of decisions of the United States Supreme Court).

18. See Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434 (1965). "It would seem, however, that problems at that stage will be less difficult than those involving trial counsel, because there is a greater consensus concerning methods of effective appellate advocacy than concerning trial tactics, because reviewing courts will be more familiar with the normal standard of competence of the appellate lawyer, and because appellate courts can request that counsel argue issues that have been omitted." *Id.* at 1447.

19. 11 Cal. 3d 134, 520 P.2d 393, 113 Cal. Rptr. 9 (1974).

Appellate Counsel's Primary Duty Is To Raise Every Arguable Issue

Standards for appellate representation in criminal appeals were first articulated in *Anders v. California*.²⁰ Defendant Anders, after a felony conviction, was assigned court-appointed counsel for his appeal to the California Court of Appeal. His counsel concluded the appeal was without merit, informed the court of his conclusion in a "no-merit letter", and asked to be relieved. The court of appeal relieved him, and with only appellant's *pro per* brief before it, affirmed the conviction.

In a subsequent attack on the court of appeal's affirmance of the conviction, the United States Supreme Court held the no-merit letter procedure unconstitutional as denying an indigent appellant the assistance of counsel.²¹ The Court said that the no-merit procedure violated counsel's duty to "act in the role of an active advocate . . . as opposed to that of amicus curiae."²² Fulfilling this duty, the Court said, no matter how frivolous an appeal may appear, requires that appointed counsel present a brief raising any "arguable" issue contained in the record, in conjunction with a no-merit letter.²³

Subsequently, in the same year *Anders* was decided, the California Supreme Court dealt with the no-merit letter procedure in *People v. Feggans*.²⁴ As in *Anders*, the appellant had court-appointed counsel for the court of appeal proceedings. Counsel concluded the appeal was without merit, so informed the court with a no-merit letter, and requested leave to withdraw, which was granted. Counsel's letter set forth seven potential assignments of error, some based on discussions with appellant

20. 386 U.S. 738 (1967).

21. For a discussion of what counsel must do even though he concludes the appeal is without merit, see AMERICAN BAR ASSOCIATION, STANDARDS WITH COMMENTARY RELATING TO CRIMINAL APPEALS 74-80 (1970) [hereinafter cited as ABA STANDARDS]; Herman, *Frivolous Criminal Appeals*, 47 N.Y.U.L. REV. 701 (1972); Note, *Withdrawal of Counsel from Frivolous Appeals*, 49 IND. L.J. 740, 748 (1974); cf. Doherty, *Wolf! Wolf!—The Ramifications of Frivolous Appeals*, 59 J. CRIM. L.C. & P.S. 1 (1968). See also *People v. Woodard*, 33 Cal. App. 3d 930, 109 Cal. Rptr. 495 (1973) (In this case, the court-appointed appellate counsel filed a brief raising issues suggested by appellant and then withdrew; the court examined the record for "even remotely arguable" issues, found none, and dismissed the appeal.) In *People v. Price*, 1 Cal. App. 3d 982, 82 Cal. Rptr. 55 (1969), appellate counsel filed a no-merit letter, and the appeal was affirmed. Thereafter, appellant filed a petition for a writ of habeas corpus with the supreme court, which treated the petition as a motion to recall the remittitur and reinstated the appeal; the court of appeal subsequently reaffirmed the judgment. *Id.* at 985, 82 Cal. Rptr. at 57.

22. 386 U.S. at 744.

23. *Id.*

24. 67 Cal. 2d 444, 432 P.2d 21, 62 Cal. Rptr. 419 (1967).

and others based on the record, but proceeded to argue against appellant's position on those points. The court of appeal affirmed the conviction.

The California Supreme Court, although affirming the conviction, after the case had been rebriefed and reargued by new counsel²⁵ in that court, found that Feggans had been denied the assistance of counsel in the court of appeal. The supreme court stated that the duty of appellate counsel was to prepare a brief which must "discuss the legal issues . . . and argue all the issues that are arguable."²⁶ For example, although the court declined to apply to Feggans's case, still pending on appeal, the recently guaranteed right to counsel at a lineup, it indicated that appointed counsel had been remiss in failing to raise the issue because it was "arguable."

In re Smith,²⁷ decided in 1970, was the first California Supreme Court decision to apply the *Anders-Feggans* arguable issue standard for appellate counsel and to hold appellate representation inadequate. In this case, after the court of appeal affirmed felony convictions for rape, kidnapping, and attempted kidnapping, appellant filed a *pro per* petition for a writ of habeas corpus in the California Supreme Court, alleging he had been denied effective assistance of counsel in the court of appeal. The supreme court treated the petition as requesting recall of the remittitur²⁸ issued by the court of appeal, for the purpose of reinvesting that court with jurisdiction to rehear the appeal. Finding that representation by appellate counsel had been inadequate, the supreme court ordered that the appeal be reinstated in the court of appeal, and that it be rebriefed and reargued by "competent counsel."²⁹

25. Although it found that the appellant had received inadequate representation in the court of appeal, the supreme court apparently felt that any error had been corrected by appointment of new counsel for the hearing in the supreme court. *See id.* at 448, 432 P.2d at 23-24, 62 Cal. Rptr. at 421-22.

26. *Id.* at 447, 432 P.2d at 23, 62 Cal. Rptr. at 421.

27. 3 Cal. 3d 192, 474 P.2d 969, 90 Cal. Rptr. 1 (1970).

28. After a case becomes final in the court of appeal, by expiration of the time to seek a hearing in the supreme court or when such hearing is denied, the court of appeal issues a document entitled a "remittitur" to the lower court. This procedure signifies in essence that the judgment of the lower court is final. *See* CAL. SUP. CT. & CTS. OF APP. R. 25, 27, 28, 68. Even after a remittitur is issued, however, a litigant may petition the appellate court which issued the remittitur to "recall the remittitur," alleging grounds which may include the ground of ineffective counsel on appeal. CAL. SUP. CT. & CTS. OF APP. R. 25(d). *See In re Smith*, 3 Cal. 3d 192, 474 P.2d 969, 90 Cal. Rptr. 1 (1970). *See generally* WITKIN, *supra* note 14, §§ 735-37. A petition for a writ of habeas corpus may be used for the same purpose. *See In re Smith*, 3 Cal. 3d 192, 474 P.2d 969, 90 Cal. Rptr. 1 (1970); *In re Martin*, 58 Cal. 2d 133, 373 P.2d 103, 23 Cal. Rptr. 167 (1962).

29. 3 Cal. 3d at 203-04, 474 P.2d at 976, 90 Cal. Rptr. at 8. Federal courts also

The supreme court found that original appellate counsel had failed to raise "crucial assignments of error, which arguably might have resulted in a reversal."³⁰ Appellate counsel's brief consisted of only a twenty page statement of facts and a one page argument, which stated that the conviction should be reversed because the state failed to prove expressly that appellant was not married to the rape victim. Describing this argument as "ludicrous," especially since appellant had testified he was not married, the court found that each count on which appellant was convicted "was potentially vulnerable to legitimate and provocative appellate contentions that should have been manifest to an alert and responsive attorney."³¹ Specifically, the court said that on the basis of the record, counsel should have argued the possible invalidity of the lineup procedure, the possible "tainting" of the in-court identification by the lineup, and the possible insufficiency of the evidence supporting crucial elements of the attempted kidnapping count. The court stated that it catalogued the "plausible" and "arguable" contentions that counsel might have raised in appellant's behalf, "not because [it concluded] that petitioner was likely to obtain a reversal on appeal, but only to demonstrate that his appellate counsel [had not rendered] the thoughtful assistance to which he was entitled."³²

order the appeal to be rebriefed and reargued by competent counsel if appellant was denied competent counsel on the original appeal. *See Arrastia v. United States*, 455 F.2d 736 (5th Cir. 1972). In separate cases, the California Supreme Court and a California court of appeal, upon briefs and arguments on a petition for habeas corpus, reversed without reinstating the appeal after holding the prior appellate representation inadequate. *Compare In re Banks*, 4 Cal. 3d 337, 482 P.2d 215, 93 Cal. Rptr. 591 (1971) with *In re Greenfield*, 11 Cal. App. 3d 536, 89 Cal. Rptr. 847 (1970). *But see People v. Scobie*, 36 Cal. App. 3d 97, 111 Cal. Rptr. 600 (1973) (petition to recall the remittitur was denied, after the court had reexamined the merits of the case and the original appellate counsel's performance and had found that there were no arguable points missed by the original counsel.) In *People v. Wells*, 261 Cal. App. 2d 468, 68 Cal. Rptr. 400 (1968), a motion to recall the remittitur was denied after consideration of a claim of denial of counsel on appeal. A motion to recall the remittitur or a petition for habeas corpus is also proper to reinstate an appeal if without fault of appellant, appellate counsel failed to file an opening brief and this failure resulted in dismissal of the appeal. *In re Martin*, 58 Cal. 2d 133, 373 P.2d 103, 23 Cal. Rptr. 167 (1962).

30. 3 Cal. 3d at 202, 474 P.2d at 975, 90 Cal. Rptr. at 7.

31. *Id.* at 198, 474 P.2d at 972, 90 Cal. Rptr. at 4.

32. *Id.* at 202, 474 P.2d at 975, 90 Cal. Rptr. at 7. In the next case in which the court held that the representation of appointed counsel in the court of appeal had been inadequate, counsel had failed to argue issues on which the case had been remanded by the United States Supreme Court. *In re Banks*, 4 Cal. 3d 337, 482 P.2d 215, 93 Cal. Rptr. 591 (1971). *See also People v. Ruiz*, 14 Cal. 3d 163, 534 P.2d 712, 120 Cal. Rptr. 872 (1975), in which appellate counsel failed to challenge the lack of evidence supporting the conviction for possession of heroin for sale; on appeal, the state raised the issue and, on that issue, the judgment was reversed.

Subsequent to *Feggans* and *Smith*, a series of California cases further elucidated the requirements for adequate appellate representation. In *People v. Rhoden*,³³ after an unsuccessful appeal from serious felony convictions resulting in a sentence of life without possibility of parole, appellant petitioned the supreme court for recall of the remittitur, on the ground that he had been denied effective counsel in the court of appeal. Once again the supreme court reinstated the appeal in the court of appeal, this time holding that the failure of counsel "to raise crucial assignments of error, which arguably might have resulted in a reversal deprived [appellant] of the effective assistance of appellate counsel to which he was entitled under the Constitution."³⁴

Counsel in this case had filed only a six page brief, consisting of two pages reciting the case history, two pages summarizing the facts, and one page presenting the sole argument for reversal, that the trial court was guilty of an abuse of discretion in denying a pretrial motion to sever certain counts. The court found this argument patently without merit. More importantly, however, the representation provided on appeal was held inadequate because counsel had not raised "colorable assignments of error" which were contained in the record. Those "colorable assignments" involved the instructions on kidnapping and the sufficiency of the evidence to establish critical elements of the kidnapping charges. The court said that "an appealing case" could have been presented on these issues, which the court found were "certainly arguable," and plausibly meritorious.³⁵

The failure of counsel to bring controlling cases before either the trial court or the appellate court was the issue in *In re Greenfield*.³⁶ In *Greenfield*, appellant's felony convictions had been affirmed on appeal. Neither trial nor appellate counsel had raised an obvious pre-emption issue based on two well-known California cases. Had that issue been presented, defendant could have been convicted of only a misdemeanor, not a felony, and the appellate court would have been required to reverse as a matter of law.

In a habeas corpus proceeding, the court of appeal held that both trial and appellate counsel had been inadequate and that their failure to raise the pre-emption issue had resulted in the loss of a "crucial defense on appeal."³⁷ The court noted that while appellate counsel had cited

33. 6 Cal. 3d 519, 492 P.2d 1143, 99 Cal. Rptr. 751 (1972).

34. *Id.* at 529, 492 P.2d at 1149, 99 Cal. Rptr. at 757.

35. *Id.*

36. 11 Cal. App. 3d 536, 89 Cal. Rptr. 847 (1970).

37. *Id.* at 541, 89 Cal. Rptr. at 849. If the court's search in *Greenfield* for a "crucial

Hale's Pleas of the Crown, he had failed to cite the two California cases bearing on the main issue in the case, even though those cases could have been found by "a half hour of rudimentary research—resort to a citator, a digest, [or] an annotated code" ³⁸ Because trial counsel had also proved inadequate, the court vacated the judgment and remanded the case to the trial court rather than reinstating the appeal.

The most recent California Supreme Court case addressing the standards of appellate advocacy is *People v. Lang*.³⁹ Appellant in that case was convicted of lewd acts with children, which had allegedly taken place in a room full of people during a party. Appellant was also committed as a mentally disordered sex offender. The convictions and commitment were affirmed by the court of appeal. Lang filed a *pro per* petition for hearing in the supreme court,⁴⁰ alleging inadequacy of appellate counsel, who had filed only a three and one-half page brief directed at the validity of the commitment and devoid of argument for reversal of the convictions.

The supreme court, reinstating the appeal in the court of appeal, found appellate counsel inadequate because, on the basis of the record, (1) he had failed to argue that the trial judge had misapplied the presumption of innocence and in effect had placed the burden of proof on appellant; (2) he had failed to argue incompetency of trial counsel, about which "there appeared to be some basis for argument"; and (3) he had failed to argue that the assaults on the victims were physically impossible, even though the court noted that, "it seems apparent that a strong argument could have been made that the [victim's] testimony was inherently improbable and insubstantial."⁴¹

The lesson of the above cases is that appellate counsel has a duty to

cial" error by appellate counsel is read to mean that the error had to *require* a reversal, the court was using an improper test, as is shown in later supreme court cases. See *People v. Lang*, 11 Cal. 3d 134, 520 P.2d 393, 113 Cal. Rptr. 9 (1974); *People v. Rhoden*, 6 Cal. 3d 519, 492 P.2d 1143, 99 Cal. Rptr. 751 (1972); *In re Banks*, 4 Cal. 3d 337, 482 P.2d 215, 93 Cal. Rptr. 591 (1971). In *In re Smith*, 3 Cal. 3d 192, 474 P.2d 969, 90 Cal. Rptr. 1 (1970), the court said counsel had failed to raise "crucial assignments of error." The court noted, however, that it did not mean to intimate that these errors were even likely to result in a reversal. *Id.* at 202-03, 474 P.2d at 966, 90 Cal. Rptr. at 7-8. Furthermore, counsel has often been held inadequate for failing to present grounds for reversal which are merely the least likely to succeed. See *In re Smith*, 3 Cal. 3d 192, 203, 474 P.2d 969, 976, 90 Cal. Rptr. 1, 8 (1970). See note 44 & accompanying text *infra*.

38. 11 Cal. App. 3d at 544, 89 Cal. Rptr. at 851.

39. 11 Cal. 3d 134, 520 P.2d 393, 113 Cal. Rptr. 9 (1974).

40. See *id.* at 136, 520 P.2d at 394, 113 Cal. Rptr. at 10.

41. *Id.* at 139, 520 P.2d at 404, 113 Cal. Rptr. at 12.

raise every arguable issue⁴² regardless of whether or not he believes the argument is meritorious enough to prevail.⁴³ The cases also suggest that appellate counsel consider with caution the advice, often found in "how to write appellate briefs" articles, that legal issues which counsel thinks will not result in a reversal should not be raised or should be relegated to an inconspicuous place in the brief. The pitfalls of such advice are illustrated in *Smith*, *Rhoden* and *Lang*. In each of those cases appellate counsel was held inadequate partly for failing to argue insufficiency of the evidence and inherent improbability of witnesses' testimony, the two arguments with the least chance of success on any appeal.⁴⁴

The standards of appellate representation set forth in the above cases require appellate counsel to present every arguable⁴⁵ issue, even

42. He has no duty to "contrive arguable issues." *In re Smith*, 3 Cal. 3d at 198, 474 P.2d at 97, 90 Cal. Rptr. at 4. This duty includes urging change in the law. "[C]ounsel serves both the court and his client by advocating change in the law if argument can be made supporting change." *People v. Feggans*, 67 Cal. 2d at 447, 432 P.2d at 23, 62 Cal. Rptr. at 421; *accord*, *Harders v. California*, 373 F.2d 839, 842 n.3 (9th Cir. 1967); *People v. Rhoden*, 6 Cal. 3d at 528 n.9, 492 P.2d at 11 n.9, 99 Cal. Rptr. at 757 n.9. See also ABA STANDARDS, *supra* note 21, at 296. However, in a recent case, the supreme court rejected a claim that appellate counsel was incompetent because he did not learn of and apprise the court of appeal of a decision of the supreme court filed just two days before, which case in fact had no applicability to appellant's case, and where the supreme court decision was filed two days before the court of appeal denied appellant's petition for rehearing. *In re Walker*, 10 Cal. 3d 764, 518 P.2d 1129, 112 Cal. Rptr. 177 (1974).

43. Of course, he must raise issues that would result in reversal. See *Johnson v. Vincent*, 370 F. Supp. 379 (S.D.N.Y. 1974). But see *In re Yurko*, 10 Cal. 3d 857, 519 P.2d 561, 112 Cal. Rptr. 513 (1974). In *Yurko*, appellant, on petition for habeas corpus, claimed he had been inadequately represented on appeal because counsel had argued only on the basis of California authority, rather than citing out-of-state authority. The court summarily rejected this claim, saying that "this is not a case where, because of either trial or appellate counsel's lack of diligence or skill" the appeal was reduced to "a farce or a sham." *Id.* at 866, 519 P.2d at 567, 112 Cal. Rptr. at 519. Apparently, although the court did not say so, there was no out-of-state authority that would have created an "arguable issue" within the meaning of the *Feggans*, *Smith*, *Rhoden*, and *Lang* principle.

44. See generally WITKIN, *supra* note 14, §§ 683-84. Witkin states that "It is extremely rare that an appellate court, in either a civil or criminal case, will reverse for insufficiency of evidence alone." *Id.*, § 685, at 669. "The inherent improbability rule . . . is not a doctrine of appellate review. The appellate court will not substitute its evaluation of the credibility of witnesses even though to some triers of fact the evidence 'would have seemed so improbable, impossible and unbelievable' as to compel a contrary judgment." B. WITKIN, CALIFORNIA EVIDENCE § 1112, at 1029 (2d ed. 1966).

45. One court has suggested that counsel "need only present issues which he considers arguable." *People v. Eckstrom*, 43 Cal. App. 3d 996, 1002, 118 Cal. Rptr. 391, 395 (1974). The court also said, "there is not compulsion on appellate counsel to carry out his client's perhaps capricious whims by presenting issues which to him, from an objective professional viewpoint, lack merit." *Id.* at 1002, 118 Cal. Rptr. at 395. See

those which he considers to be nonmeritorious, in its best light.⁴⁶ What constitutes an "arguable" issue depends on whether the issue was "crucial in the context of the particular circumstances at hand."⁴⁷ When it is doubtful whether an issue is arguable but nonmeritorious and must therefore be raised,⁴⁸ or whether it is frivolous and need not be raised, counsel should resolve his doubt in favor of appellant by presenting the issue to the court,⁴⁹ thereby allowing the appellate justices to evaluate the merit of each contention.

Appellate Counsel Should Seek a Reversal, on or Outside the Record

The cases discussed above impose a constitutional duty on appellate counsel to raise every arguable issue contained in the record on appeal. Nevertheless, traditional notions of justice may not always be satisfied, and the validity of the guilt-finding process may be undermined if an appeal is limited solely to the record on appeal. Often

also *Cardarella v. United States*, 375 F.2d 222, 230 (8th Cir. 1967), *cert. denied*, 389 U.S. 882; *Finer, Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973). The court in *Eckstrom* was concerned with what it described as the ever increasing frequency of attacks by appellate counsel on the competency of trial counsel.

46. Errors that individually could not result in a reversal can, when accumulated, achieve that result. *People v. Buffum*, 40 Cal. 2d 709, 726, 256 P.2d 317, 326 (1953); *see generally* WITKIN, *supra* note 14, § 756.

47. *In re Smith*, 3 Cal. 3d 192, 203, 474 P.2d 969, 975, 90 Cal. Rptr. 1, 7 (1970).

48. This distinction was discussed recently. *See People v. Scobie*, 36 Cal. App. 3d 97, 111 Cal. Rptr. 600 (1973). There the court was faced with a motion to recall the remittitur on the ground that appellate counsel had failed to argue that the trial court had erred in not instructing on a lesser included offense. The court, reviewing the entire record on the merits and finding no substance to the motion, denied the motion. Interestingly, the court noted that in light of *In re Smith*, 3 Cal. 2d 192, 474 P.2d 969, 90 Cal. Rptr. 1 (1970) and *People v. Rhoden*, 6 Cal. 3d 519, 492 P.2d 1143, 99 Cal. Rptr. 751 (1972), "we are required to judge not only the merits of the appeal, but the performance of [appellate] counsel." *People v. Scobie*, 36 Cal. App. 3d at 99, 111 Cal. Rptr. at 601. Apparently, some courts of appeal are tiring of frivolous arguments which have been characterized, in a civil case, as a "prolonged, unwarranted imposition on the court . . . as a consequence of [which] the Court of Appeal in every district does process and decide numerous appeals of little merit." *Parker v. Parker*, 43 Cal. App. 3d 610, 614, 117 Cal. Rptr. 707, 710 (1974). *See generally*, Herman, *Frivolous Criminal Appeals*, 47 N.Y.U.L. REV. 701 (1973); Palmer, *Implementing the Obligation of Advocacy in Review of Criminal Convictions*, 65 J. CRIM. L.C. & P.S. 267 (1974).

49. *Cf. People v. Sumner*, 262 Cal. App. 2d 409, 69 Cal. Rptr. 15 (1968). In *Sumner*, the court dismissed the appeal as frivolous but recognized a distinction between "a frivolous appeal and one which simply has no merit." The court implied that when appellate counsel is in doubt about the distinction, he should resolve it in favor of raising the issue and should not seek to withdraw from the case. *Id.* at 415, 69 Cal. Rptr. at 19.

it is evidence outside the record which might have led to a disposition more favorable to the defendant or might even have resulted in his acquittal. The presentation of this evidence on appeal may consequently prove crucial to setting aside the conviction.⁵⁰

The notion that appellate counsel must go beyond the record is consonant with the policy underlying his role in the criminal process. His duty, as declared by the Supreme Court in *Entsminger v. Iowa*,⁵¹ is to "function in the active role of an advocate."⁵² To be an effective advocate, he must "not omit any essential honorable step in the defense, [regardless of] his compensation or the nature of his appointment."⁵³ To discharge his duty faithfully, counsel, especially one newly appointed for the appeal, must undertake an extensive examination of the trial transcript and the evidence presented by the defendant.⁵⁴ It is quite possible that this investigation may raise problems not resolved in the record. If counsel is to be an effective advocate, he cannot, consistent with his duty not to omit any honorable step in the defense, fail to seek resolution of these problems or fail to bring such resolution before the court.

Faced with cases involving issues which can be resolved only by material outside the record on appeal, the courts have recognized that it is appropriate for counsel to examine the entire case and have perhaps imposed on counsel the duty of undertaking this investigation. *People v. Lang*,⁵⁵ the latest decision addressing the problem, also provides the most explicit suggestion of such a duty. In *Lang*, the California Supreme Court ordered an appeal reinstated in the court of appeal because appellate counsel had failed to argue crucial issues contained in the record on appeal. One of the issues which the court ordered reargued

50. See *In re Hochberg*, 2 Cal. 3d 870, 471 P.2d 1, 87 Cal. Rptr. 681 (1970). The court indicated that one result of poor trial representation may be a record insufficient to support an appeal, forcing resort to collateral remedies. *Id.* at 875, 471 P.2d at 4, 87 Cal. Rptr. at 684.

51. 386 U.S. 748 (1967).

52. *Id.* at 751.

53. AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 174 (Approved Draft 1971).

One case suggests that oral argument in the appellate court may be an essential step and hence should not be waived by counsel. *People v. Lang*, 11 Cal. 3d 134, 520 P.2d 393, 113 Cal. Rptr. 9 (1974). Nevertheless, some California courts of appeal seem to encourage waiver of oral argument, and it appears that appellate counsel often do waive it. In 1973, in Division One of the Fourth Appellate District, two-thirds of the criminal appeals were submitted without oral argument. *People v. Lang*, 11 Cal. 3d 134, 144, 520 P.2d 393, 400, 113 Cal. Rptr. 9, 16 (Clark, J., dissenting).

54. See *Hardy v. United States*, 375 U.S. 277, 280-81 (1964).

55. 11 Cal. 3d 134, 520 P.2d 393, 113 Cal. Rptr. 9 (1974).

was possible inadequacy of trial counsel. Significantly, the court stated:

Certainly, on renewal of defendant's appeal, counsel should ascertain whether or not defendant received adequate trial representation. In the event the record is not conclusive of the question, counsel should consider the possibility of alternative relief through habeas corpus.⁵⁶

In dissent, Justice Clark reiterated that review on direct appeal was limited to the trial court record and concluded that the record before him did not support the contention that inadequacy of trial counsel was a "critical" issue. Therefore, he disagreed with the majority's direction to counsel that he consider collateral attack if the record was inadequate. In Justice Clark's opinion:

[C]ounsel below was appointed to represent defendant on appeal, [and therefore] properly limited his representation to matters within the scope of appellate review. Counsel could not expect to be reimbursed for investigating possible grounds for habeas corpus relief, because a defendant's right to appointed counsel has not been extended to applications for collateral relief. Therefore, it is both unfair and unrealistic to suggest that defendant's appointed counsel on appeal was ineffective if he did not conduct such an investigation⁵⁷

The dissent in effect serves to highlight the implication in the majority's opinion that appellate counsel has a duty to "consider" possible grounds for collateral attack on matters outside the record on appeal, at least when the record raises the possibility of such issues, and to initiate collateral attack if such action is appropriate under the circumstances of the case.⁵⁸

56. *Id.* at 141, 520 P.2d at 398, 113 Cal. Rptr. at 14.

57. *Id.* at 144, 520 P.2d 399, 113 Cal. Rptr. at 16 (dissent).

58. *But cf. In re Golia*, 16 Cal. App. 3d 775, 94 Cal. Rptr. 323 (1971). *Golia* involved an appeal from kidnapping and grand theft convictions. Pending appeal, appellant personally filed a petition for a writ of habeas corpus in the California Supreme Court, which transferred the petition to the court of appeal for consideration in conjunction with the appeal pending in that court. In that petition, appellant claimed his trial counsel had been inadequate, and that he was being denied effective assistance of counsel on the pending appeal, because appellate counsel had failed to file the very same habeas corpus petition raising the inadequacy of trial counsel. The court of appeal held that trial counsel had not been inadequate and further stated that court-appointed appellate counsel had no "duty to file or to prosecute an extraordinary writ believed to be desirable or appropriate by the defendant." *Id.* at 786, 94 Cal. Rptr. at 330. Moreover, the court could find no authority for such a duty. *Id.* Since trial counsel was held to be adequate, however, the court's comment was dictum. In addition, the court dealt only with the issue of a duty when an appellant desires appellate counsel to file a petition for a writ. The court did not deal with the issue of a duty to file such a petition when appellate counsel himself believes it is appropriate or is placed on notice of facts that would justify such a duty. Finally, it should be noted that *Golia* preceded *People v. Lang* and did not mention *In re Ketchel*, 68 Cal. 2d 397, 438 P.2d 625, 66 Cal. Rptr. 881 (1968).

The court in *In re Ketchel*,⁵⁹ which concerned the issue of whether, during an appeal, appointed counsel had the right, upon a proper showing, to have appellant examined by a psychiatrist, alluded to the propriety of appellate counsel's investigation of the entire case. The attorney general opposed any examination, on the ground that it could lead to no relevant evidence since the appeal was limited to the facts and issues contained in the record on appeal. In rejecting this argument, the court said that the psychiatrist might aid appellate counsel's right and need to communicate personally with his client in order to develop his argument on appeal,⁶⁰ and that counsel's duty under *Anders v. California* would be promoted by "permitting counsel broad discretion in deciding how to *investigate* and *develop* all potentially available arguments."⁶¹

The court in *Ketchel* went on to say that "[t]he assistance of the informed psychiatrist could lead to possible bases for collateral attack"⁶² and that "the results of the psychiatric examination, even if not of direct use or 'admissible' on appeal, may well assist counsel's overall strategy on both appeal and collateral remedies."⁶³

Thus, the court in *Ketchel* directs that appellate counsel in seeking grounds for reversal may look beyond the record and investigate the entire case,⁶⁴ even when nothing in the record itself suggests the existence of such grounds outside the record. Furthermore, the opinion in *Ketchel* indicates that the court deems such effort by appellate counsel proper.

Given that counsel may, and perhaps should in appropriate cases, go beyond the record, the question arises as to the scope of such investigation. Admittedly the scope of the investigation cannot be as great as that required of trial counsel. Nevertheless, since the "standards

59. 68 Cal. 2d 397, 438 P.2d 625, 66 Cal. Rptr. 881 (1968).

60. *Id.* at 400, 438 P.2d at 627, 66 Cal. Rptr. at 883-84. ABA STANDARDS, *supra* note 21, at 296; *Smith v. Superior Ct.*, 68 Cal. 2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1968). See *In re Allison*, 66 Cal. 2d 282, 425 P.2d 193, 57 Cal. Rptr. 593 (1967) (importance of communication between appellate counsel).

61. 68 Cal. 2d at 402, 438 P.2d at 629, 66 Cal. Rptr. at 885 (1968) (emphasis added).

62. *Id.* at 401, 438 P.2d at 628, 66 Cal. Rptr. at 884.

63. *Id.* at 400, 438 P.2d at 627, 66 Cal. Rptr. at 883.

64. In a 1970 case, the court reversed a conviction on the ground that the trial court had refused to allow defendant to state his reasons for desiring removal of his trial counsel. The record did not show any incompetency of his counsel, but the court said "that is not the test," thus showing the importance of going beyond the record itself in order to develop grounds for reversal. *People v. Marsden*, 2 Cal. 3d 118, 126, 465 P.2d 44, 49, 84 Cal. Rptr. 156, 161 (1970).

of competence apply equally to trial and appellate counsel,"⁶⁵ cases dealing with the duties of trial counsel in regard to preparation of a case are relevant.⁶⁶ Generally these related cases state the sixth amendment requires "counsel reasonably likely to render and rendering reasonably effective assistance."⁶⁷ Whether this standard is met in any particular case is "a question of judgment and degree to be answered in light of all of the circumstances and with a view to fundamental fairness."⁶⁸

In order to fulfill the requirements for adequate assistance of counsel, appellate counsel should make a reasonable investigation of the case. Relevant California cases have talked of a duty "to investigate

65. *Rawlins v. Craven*, 329 F. Supp. 40, 42 (C.D. Cal. 1971); *accord*, *Monsour v. Cady*, 342 F. Supp. 353 (E.D. Wis. 1972); *cf. In re Saunders*, 2 Cal. 3d 1033, 472 P.2d 921, 88 Cal. Rptr. 633 (1970). California provides by statute: "it is the duty of an attorney . . . (h) Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed." CAL. BUS. & PROF. CODE § 6068(h) (West 1974). This duty is applicable to appellate counsel. *See Lascher v. California*, 64 Cal. 2d 687, 414 P.2d 398, 51 Cal. Rptr. 270 (1966). As one court stated, "Whether an attorney is appointed by the court or selected and paid by the [appellant], the same exercise of professional judgment controls those decisions." *People v. Scobie*, 36 Cal. App. 3d 97, 100, 111 Cal. Rptr. 600, 602 (1973). *See Nickols v. Gagnon*, 454 F.2d 467, 471 (7th Cir. 1971), *cert. denied*, 408 U.S. 925 (1972) (referring specifically to appellate counsel).

66. *See In re Smith*, 3 Cal. 3d 192, 474 P.2d 969, 90 Cal. Rptr. 1 (1970); *In re Ketchel*, 68 Cal. 2d 397, 399-400, 438 P.2d 625, 627, 66 Cal. Rptr. 881, 883 (1968).

67. *In re Saunders*, 2 Cal. 3d 1033, 1041, 472 P.2d 921, 926, 88 Cal. Rptr. 633, 638 (1970). For a collection and discussion of recent cases adopting this standard, see Comment, *The Right to Competent Counsel: Emergence of a Sixth Amendment Standard of Review on Appeal and the Persistence of the "Sham and Farce" Rule in California*, 15 SANTA CLARA LAW. 355, 364-76 (1975) [hereinafter cited as Comment, *Right to Competent Counsel*].

Other language used to describe the standard of competency of counsel in criminal case is instructive. "[W]ithdrawal of crucial defenses from the case, thereby reducing the trial to a farce or sham . . ." *People v. Lang*, 11 Cal. 3d at 142, 520 P.2d at 398, 113 Cal. Rptr. at 14. "[C]ounsel's lack of diligence or competence reduced the trial to a 'farce or sham' . . . he did not effectively supply to a defendant those skills and legal knowledge which we can reasonably expect from any member of the bar." *People v. Cook*, 13 Cal. 3d 663, 672-73, 532 P.2d 148, 119 Cal. Rptr. 500, 506 (1975). The "farce or sham" language has been severely criticized.

For a discussion of decisions concerning the proper standard and language used to describe the standard, see Kaus & Mallen, *supra* note 10.

The "farce and sham" standard has been abandoned in numerous jurisdictions. See cases collected in Comment, *The Right to Competent Counsel*, *supra* at 358 n.26.

68. *In re Saunders*, 2 Cal. 3d 1033, 1041, 472 P.2d 921, 926, 88 Cal. Rptr. 633, 638. The standard suggested in recent cases is that counsel must provide the skill and competence of ordinary attorneys in criminal cases. *See, e.g., Tollett v. Henderson*, 411 U.S. 258, 266 (1972); *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974); Comment, *Right to Competent Counsel*, *supra* note 67, at 369-76; Comment, *Inadequate Representation of Counsel in Criminal Cases: The Need for a New Approach*, 9 U.S.F.L. REV. 166, 177-85 (1974).

carefully all defenses of fact and of law that might have been available to defendant . . . and to obtain such psychiatric and medical evidence as might be relevant to the case"⁶⁹ One court, discussing the duty of appellate counsel in Wisconsin post-conviction proceedings, which combine appeal with other challenges to conviction—essentially the procedure suggested by the court in *People v. Lang* and *In re Ketchel*—stated that counsel had a duty to make a "conscientious examination" of the case.⁷⁰

What constitutes a "conscientious examination" or a reasonable investigation must, of course, be determined on a case by case basis. Nonetheless, as will be discussed below, an examination of the complete record in the trial court, including the offered and introduced evidence, and interviews with the appellant himself and with his trial counsel, would appear in most cases to meet the minimum requirements. After this examination, if appellate counsel concludes that the record contains all arguable grounds for reversal, then his efforts toward reversal may properly be based solely on the appellate record. If, however, these preliminary steps put counsel on notice of possible grounds for reversal outside the record on appeal, counsel should and must investigate those matters and, if appropriate, initiate collateral attack.

In general, both good practice and good sense require that counsel review the entire case rather than restricting his investigation to the record on appeal and that he discuss the case with both appellant and trial counsel.⁷¹ Trial counsel may provide a helpful evaluation of the errors to be urged on appeal, and both trial counsel and appellant may offer useful information concerning the practical seriousness of those errors. Although a successful criminal appeal is often based on the

69. *People v. Lang*, 11 Cal. 3d 134, 142, 520 P.2d 393, 398, 113 Cal. Rptr. 9, 14 (1974), citing *In re Saunders*, 2 Cal. 3d 1033, 472 P.2d 921, 88 Cal. Rptr. 633 (1970). See *In re Williams*, 1 Cal. 3d 168, 460 P.2d 984, 81 Cal. Rptr. 784 (1969); *People v. Welborn*, 257 Cal. App. 2d 513, 65 Cal. Rptr. 8 (1968).

70. *Monsour v. Cady*, 342 F. Supp. 353, 360 (E.D. Wis. 1972).

71. See *United States ex rel. Johnson v. Vincent*, 370 F. Supp. 379 (S.D.N.Y. 1974); ABA STANDARDS, *supra* note 21, at 97. No such suggestion is contained in the notice sent to appointed counsel by any of the California courts of appeal.

Contact with the trial defense counsel is helpful and may also be necessary in some cases. See *United States ex rel. Johnson v. Vincent*, 370 F. Supp. 379 (S.D.N.Y. 1974); cf. *People v. Martinez*, 14 Cal. 3d 533, 537, 535 P.2d 739, 741, 121 Cal. Rptr. 611, 613 (1975). In discussing trial counsel's conduct with regard to discovering possible grounds for a motion to suppress evidence, the court in *Martinez* stated that counsel "could have learned the grounds for a pretrial suppression motion by simply interviewing his client." *Id.* at 537, 535 P.2d at 741, 121 Cal. Rptr. at 613. *In re Ketchel*, 68 Cal. 2d 397, 438 P.2d 625, 66 Cal. Rptr. 881 (1968), mentions the importance of appellate counsel discussing the case with appellant. See text accompanying notes 59-64 *supra*.

work of trial counsel who is able to recognize important procedural, substantive, and constitutional issues and who has the foresight to preserve them in the record for appeal, the effective pursuit of post-trial remedies requires as well that appellate counsel ask a wide variety of questions and examine a number of exhibits and other documents. Questions concerning the information extraneous to the record which counsel must ask merely to understand the record itself include the following: What was the total evidence against appellant? What evidence did trial counsel strive to keep out? Why was no ballistics expert or criminalist called by the defense? What investigation was made of appellant's mental condition or capacity? Why were certain witnesses called or not called by the defense? Why did appellant testify or not testify? Was there an illegal search and seizure? What was the nature and extent of trial counsel's investigation of the facts and research of the law? Furthermore, the answers to these questions may reveal issues either absent from or inadequately treated in the record.

The suggested inquiry of appellant and trial counsel should not necessarily be viewed as second-guessing trial counsel; reasonable inquiry is simply prerequisite to a comprehensive understanding of the case. With that understanding, appellate counsel should be able to avoid both unjustified attacks on trial counsel's competency and unjustified failure to challenge trial counsel's competency—two objectionable practices often noted by the courts.⁷²

Appellate counsel has substantial means available to examine the entire case for possible grounds for reversal. The reporter's transcript is the basic source. Nonetheless, the clerk's transcript, which contains minutes of every proceeding, should also be carefully examined, as it may suggest issues or contain facts which may prove important. For example, in *In re Hwamei*,⁷³ the principal issue on appeal was incompetency of trial counsel in failing adequately to investigate and prepare a first degree murder case which resulted in imposition of the death penalty. The clerk's transcript contained an affidavit for fees filed by the court appointed trial counsel. The affidavit, showing only twenty hours of trial preparation, provided persuasive evidence in support of appellant's contention that trial counsel had been inadequate.

72. See, e.g., *People v. Meals*, 48 Cal. App. 3d 215, 224, 121 Cal. Rptr. 742, 748 (1975); *People v. Kraus*, 47 Cal. App. 3d 568, 578, 121 Cal. Rptr. 11, 18 (1975); *People v. Eckstrom*, 43 Cal. App. 3d 996, 118 Cal. Rptr. 391 (1975). For discussion of trial counsel's duty to investigate the case and potential defenses, see Comment, *Federal Habeas Corpus—A Hindsight View of Trial Attorney Effectiveness*, 27 LA. L. REV. 784, 784-85 (1967); Comment, *Right to Competent Counsel*, *supra* note 67, at 371, 375.

73. 37 Cal. App. 3d 554, 112 Cal. Rptr. 464 (1974).

In *People v. Gloria*,⁷⁴ the reporter's transcript did not contain the judge's oral jury instructions, but the clerk's transcript contained a copy of the written instructions, which contained serious error. The attorney general claimed that correct instructions had been given orally. The conviction was reversed, either because of the erroneous instructions, or, assuming the trial court had verbally given correct instructions, because the defendant "[had] been denied his due process right to an accurate record on appeal."⁷⁵

The clerk's transcript may also suggest error in certain pretrial or post-trial proceedings which are not contained in the reporter's transcript.⁷⁶ Discussion with appellant and trial counsel about those events and an examination of the physical and documentary evidence at trial should enhance appellate counsel's understanding of what happened at those proceedings, and should aid him in deciding whether or not to request augmentation of the record to include a reporter's transcript of the proceedings.

Questioning of appellant and trial counsel about the case may also lead to grounds for reversal which do not appear in the record. In *People v. Coleman*,⁷⁷ for example, counsel appointed by the court in an automatic death penalty appeal discussed the case with appellant and his trial counsel, read the district attorney's closing argument to the jury, and thereupon concluded that appellant's prior felony conviction had proved a major factor in the jury's decision to invoke the death penalty. This conviction had been disclosed to the jury, without objections, during cross-examination of appellant.

When he questioned the appellant further, counsel learned that the prior felony had occurred in Virginia, that appellant's trial counsel in that case had been appointed only a few minutes before the "trial," and that appellant had plead guilty without inquiry by the court as to his understanding of his constitutional rights. This information led appellate counsel to question appellant's Virginia counsel, as well as his trial judge, who since had become a justice of the Virginia Supreme Court. Both of them confirmed appellant's story and signed declarations to that

74. 47 Cal. App. 3d 1, 120 Cal. Rptr. 534 (1975).

75. *Id.* at 7, 120 Cal. Rptr. at 537.

76. See, e.g., WITKIN, *supra* note 14, §§ 763, 765-66, 769. See also, Stout, *Appellate Review of Criminal Convictions on Appeal*, 43 CALIF. L. REV. 381, 395-96 (1955). The clerk's transcript has been used to achieve a reversal in several cases. See, e.g., *People v. Tealer*, 48 Cal. App. 3d 598, 122 Cal. Rptr. 144 (1975); *People v. Chapman*, 47 Cal. App. 3d 597, 121 Cal. Rptr. 315 (1975); cf. *People v. Kirchner*, 233 Cal. App. 2d 83, 43 Cal. Rptr. 218 (1965) (clerk's transcript used to achieve affirmance).

77. 71 Cal. 2d 1159, 459 P.2d 248, 80 Cal. Rptr. 920 (1969).

effect prepared by appellate counsel. The declarations, along with those of appellant and his California trial counsel, were attached to a petition for habeas corpus prepared and filed by court appointed appellate counsel with the California Supreme Court.⁷⁸

Although the court found nothing in the record on appeal to support appellant's contention concerning jury prejudice, the court issued an order to show cause in the habeas corpus proceeding, in order to determine "if necessary, whether the evidence of the prior conviction vitiated the judgment before us on the automatic appeal."⁷⁹ Since the conviction was reversed on grounds raised in the appeal, the issue raised in the writ case was not reached by the supreme court, although the lower court later decided it in appellant's favor. On retrial, evidence of the prior conviction was stricken on the basis of the evidence secured by appellate counsel. This time, the death penalty was not invoked, and appellant received a life sentence.⁸⁰

The facts in *In re Hwamei*⁸¹ further illustrate the possible effects of counsel's investigation beyond the record. In that case, appellant had been sentenced to death after being convicted on two counts of first degree murder, armed robbery, two counts of kidnapping to commit robbery, and two counts of assault with a deadly weapon with intent to commit murder. At trial, several eye witnesses, as well as fingerprint evidence, identified the appellant as Baltazar Garcia Estolas. The appellant claimed, however, that he was Tomy Hwamei, not Estolas.

Prior to the trial, court-appointed trial counsel had arranged to have appellant examined by a psychiatrist, but he had neglected to inform the psychiatrist of the body of evidence that proved conclusively that appellant was Estolas, not Hwamei. Lacking that crucial information, the psychiatrist reported that appellant was sane, not delusional, and that there was no reason to disbelieve that appellant was Hwamei. The case proceeded to trial, at which the sole defense presented was appellant's testimony that he was Hwamei and that he had never been in California. The jury quickly convicted appellant and invoked the death sentence.

78. See record, *People v. Coleman*, 71 Cal. 2d 1159, 459 P.2d 248, 80 Cal. Rptr. 920 (1969). See also *People v. Shells*, 4 Cal. 3d 626, 483 P.2d 1227, 94 Cal. Rptr. 275 (1971), in which trial counsel was held inadequate for failing to investigate whether a charged prior conviction was a felony.

79. 71 Cal. 2d at 1169, 459 P.2d at 254-55, 80 Cal. Rptr. at 926-27.

80. See record, *People v. Coleman*, Crim. No. 40431 (Alameda County Super. Ct. Apr. 29, 1970). See also *Suggs v. United States*, 391 F.2d 971, 976 (D.C. Cir. 1968) (impeachment by a prior felony conviction).

81. 37 Cal. App. 3d 554, 112 Cal. Rptr. 464 (1974).

Court-appointed appellate counsel was faced with a problem similar to that which had confronted the trial counsel—a client who continued to insist he was Hwamei. Nevertheless, appellate counsel, after conferring with appellant and trial counsel, consulted the original psychiatrist. When informed of the positive proof identifying appellant as Estolas, the psychiatrist changed his opinion about appellant's sanity at the time of trial and at the time of the offenses. Following up other leads, appellate counsel contacted friends and relatives of Estolas, both in the United States and the Philippines.⁸² From these sources, he derived a wealth of information attesting to appellant's personal and familial history of insanity and mental illness. Another psychiatrist, after examining all this information, joined in the conclusion that appellant had been insane both at trial and at the time of the offenses.⁸³

None of this information, of course, was contained in the record on appeal; therefore, court-appointed appellate counsel prepared and filed in the court of appeal a petition for habeas corpus, supported by declarations of friends, relatives, and the psychiatrists. This evidence, together with reports of two additional psychiatrists appointed by the court of appeal, convinced the court that trial counsel had not adequately investigated the defenses of diminished capacity and insanity. The court therefore reversed the conviction and granted the writ.⁸⁴

At the retrial, based upon the information originally secured by appellate counsel but extensively enlarged and developed by skilled and dedicated trial counsel,⁸⁵ Hwamei, invoking a "diminished capacity" defense, was found not guilty of all counts of armed robbery, kidnapping to commit robbery, and assault with a deadly weapon with intent to commit murder; he was found guilty only of involuntary manslaughter, and then found not guilty by reason of insanity and committed to Atascadero State Hospital.⁸⁶

A deterrent to the suggested investigation by court-appointed appellate counsel of the entire case was pointed out by the dissent in *People v. Lang*.⁸⁷ Justice Clark noted that the appointment is for the

82. *Id.* at 561, 112 Cal. Rptr. at 468.

83. *Id.*

84. *Id.* at 563, 112 Cal. Rptr. at 469.

85. Trial counsel was Deputy Public Defender Jack Rosenberg, of the office of the Public Defender, San Joaquin County. See record, *People v. Estolas*, No. 20753 (San Joaquin County Super. Ct., Mar. 24, 1975).

86. See Order for Commitment and Suspending Proceedings, *People v. Estolas*, aka Hwamei, No. 20753 (San Joaquin County Super. Ct., filed Mar. 24, 1975).

87. 11 Cal. 3d 134, 520 P.2d 393, 113 Cal. Rptr. 9 (1974).

appeal and that counsel is entitled to a fee and expenses only for work on the appeal. Thus, although an appellate court could award fees and expenses to appellate counsel for investigation of the entire case and initiation of collateral attack,⁸⁸ appointed appellate counsel should realize that presently such effort must be made without expectation of reimbursement. The appellate courts should, however, compensate counsel,⁸⁹ both because this additional effort is part of counsel's constitutional duty to provide adequate representation and because securing competent and thorough representation is a primary concern of the appellate courts themselves.⁹⁰

Alternative Methods of Bringing New Evidence Before the Appellate Court

By reasonably investigating the entire case, within and outside the record on appeal, appellate counsel may discover facts which are not contained in the record on appeal or which are only alluded to in the record, but which, if developed by additional facts, might result in reversal. Appellate counsel has available several methods to develop those facts and to use them to appellant's benefit.

For example, counsel may consider filing in the trial court a motion for new trial on the ground of newly discovered evidence or on other statutory grounds.⁹¹ Once a notice of appeal is filed, however, the trial court loses jurisdiction to entertain a motion for a new trial,⁹² to

88. See CAL. PEN. CODE § 1241 (West 1970 & Supp. 1975); cf. *Polakovic v. Superior Ct.*, 28 Cal. App. 3d 69, 104 Cal. Rptr. 383 (1972).

89. If counsel's effort results in the court acting favorably, however, as it did in *Hwamei*, appointed counsel may receive both reimbursement for necessary expenses and the usual "honorarium" awarded by appellate courts. "Despite recent increases in fees paid to appointed counsel there is great doubt whether the compensation received is reasonable on a per-hour basis. For example a recent study in the First Appellate District showed an average payment of \$499.53 per case, with an average of 61¼ hours time claimed per case; thus, after allowing for out-of-pocket expenses claimed by counsel, compensation was only \$6.83 per hour." 1975 JUDICIAL COUNCIL REPORT, *supra* note 2, at 20 n.3.

For a discussion of the need to improve the method for securing legal representation for indigent appellants, see Langford, *The Defense of Indigent Criminal Appellants—Where Are We Now?*, 50 CALIF. ST. B.J. 173 (1975).

In *Hwamei* and *Coleman*, court-appointed counsel were awarded costs and honoraria, but counsel was appointed to represent petitioner in each writ case *after* issue of the order to show cause. See *In re Hwamei*, 37 Cal. App. 3d 554, 112 Cal. Rptr. 464 (1974); *In re Coleman*, 71 Cal. 2d 1159, 459 P.2d 248, 80 Cal. Rptr. 920 (1969).

90. Cf. *Polakovic v. Superior Ct.*, 28 Cal. App. 3d 69, 104 Cal. Rptr. 383 (1972).

91. See CAL. PEN. CODE § 1181 (West 1970 & Supp. 1975).

92. See *People v. Murphy*, 70 Cal. 2d 109, 448 P.2d 945, 74 Cal. Rptr. 65 (1969);

vacate its judgment,⁹³ or to entertain a writ of habeas corpus⁹⁴ or coram nobis.⁹⁵ Thus, if an appeal has been filed, counsel has no effective remedy in the trial court.⁹⁶

If the important additional facts are contained in the trial court record but not in the appellate record, those facts can be included by augmentation of the record on appeal pursuant to Rule 12 of the California Rules of Court.⁹⁷ If those facts are not contained in the trial record, however, resort to this procedure will prove futile, because augmentation is limited to inclusion of matters in the trial court record which were not included in the normal record on appeal.⁹⁸

Counsel may consider bringing those new facts to the attention of the appellate court by asking the court to take additional evidence outside the trial record pursuant to Rule 23(b) of the California Rules of Court.⁹⁹ That rule is available, however, only if the taking of the new

People v. Sonoqui, 1 Cal. 2d 364, 35 P.2d 123 (1934). See generally WITKIN, *supra* note 14, §§ 557, 637-38.

93. See People v. Sonoqui, 1 Cal. 2d 364, 35 P.2d 123 (1934); People v. Helsley, 41 Cal. App. 2d 935, 108 P.2d 97 (1940).

94. See France v. Superior Ct., 201 Cal. 122, 255 P. 815 (1927).

95. See People v. Haynes, 270 Cal. App. 2d 318, 75 Cal. Rptr. 800 (1969); cf. People v. Esquibel, 44 Cal. App. 3d 591, 593, 118 Cal. Rptr. 748, 750 (1975).

96. The trial court, however, retains jurisdiction to grant bail pending appeal. See CAL. SUP. CT. & CTS OF APP. R. 32; Molinari, *Bail Pending Appeal in California*, 1 U.S.F.L. REV. 217 (1967). The trial court also retains jurisdiction to consider and order appointment of a psychiatrist to examine appellant pending appeal. *In re Ketchel*, 68 Cal. 2d 397, 399 n.2, 438 P.2d 625, 627 n.2, 66 Cal. Rptr. 881, 883 n.2 (1968).

97. Rule 12 reads in relevant part, "(a) [Augmentation] On suggestion of any party or on its own motion, the reviewing court, on such terms as it deems proper, may order that the original or a copy of a paper or record on file or lodged with the superior court be transmitted to it, or that portions of the oral proceedings be transcribed, certified and transmitted to it, or that an agreed or settled statement of portions of the oral proceedings be prepared and transmitted to it; and when so transmitted they shall be deemed a part of the record on appeal" CAL. SUP. CT. & CTS. OF APP. R. 12.

98. Thus, if the matter desired to be brought to the attention of the appellate court is not contained in the trial court record, it may not be included by augmentation. See People v. Brawley, 1 Cal. 3d 277, 461 P.2d 361, 82 Cal. Rptr. 161, 171 (1969); People v. Pearson, 70 Cal. 2d 218, 449 P.2d 217, 72 Cal. Rptr. 881 (1969); CAL. SUP. CT. & CTS. OF APP. R. 33.

99. Rule 23(b), in relevant part, reads: "The court may grant or deny the application in whole or in part, and subject to such conditions as it may deem proper. If the application is granted, the court, by appropriate order, shall direct that the evidence be taken before the court or a justice thereof, or before a referee appointed for the purpose. The court . . . shall indicate the issues on which the evidence is to be taken. Where documentary evidence is offered . . . the court may admit the document and add it to the record on appeal." CAL. SUP. CT. & CTS. OF APP. R. 23(b). For a discussion of the derivation of Rule 23(b) see People v. Pena, 25 Cal. App. 3d 414, 421, 101 Cal. Rptr. 804, 807 (1972).

evidence by the appellate court would result in affirmance¹⁰⁰ or in reversal and dismissal rather than reversal and new trial.¹⁰¹ The rule may not be invoked to secure "an appellate court's general reversal of a judgment on the basis of newly discovered evidence presented in the appellate court."¹⁰² Furthermore, Rule 23(b) is inapplicable in a criminal case unless a jury trial has been waived.¹⁰³ Thus, in the usual case, Rule 23(b) will not help appellate counsel solve the problem discussed here.

If the issue to be developed is not contained in the record on appeal as augmented, and appellate counsel nevertheless raises it, the appellate court will not consider the issue, for an appeal is limited to so much of the trial court record as is before the appellate court.¹⁰⁴ A problem arises, however, if the issue is alluded to in the record but is not sufficiently supported to the meritorious. If counsel nonetheless raises it as is, the issue will probably be lost on the merits in the appeal, and the appellate court's determination may be res judicata if it is raised again subsequently by way of collateral attack.¹⁰⁵

If counsel decides to defer raising the issue to which the record alludes¹⁰⁶ until collateral attack,¹⁰⁷ there is a substantial risk that appellant's position will be prejudiced. First, if counsel is court-appointed, the appointment terminates at the conclusion of the unsuccessful appeal, leaving the client without counsel in pursuing his collateral attack.¹⁰⁸ Second, a court considering the later collateral attack may refuse to hear the issue on the grounds of undue delay, waiver, or failure to exhaust the

100. See, e.g., *People v. Shaw*, 237 Cal. App. 2d 606, 47 Cal. Rptr. 96 (1965).

101. *People v. Benford*, 53 Cal. 2d 1, 345 P.2d 928 (1959).

102. *People v. Pena*, 25 Cal. App. 3d 414, 422, 101 Cal. Rptr. 804, 807 (1972).

103. *Id.*

104. CAL. SUP. CT. & CTS. OF APP. R. 13; see *In re Hochberg*, 2 Cal. 3d 870, 471 P.2d 1, 87 Cal. Rptr. 681 (1970); *People v. Merriam*, 66 Cal. 2d 390, 426 P.2d 161, 58 Cal. Rptr. 1 (1967).

105. See, e.g., *In re Waltreus*, 62 Cal. 2d 218, 397 P.2d 1001, 42 Cal. Rptr. 9 (1965). See also *In re Sterling*, 63 Cal. 2d 486, 407 P.2d 5, 47 Cal. Rptr. 205 (1965).

106. This procedure is often suggested. See ABA STANDARDS, *supra* note 21, § 8.5; 2 CALIFORNIA CRIMINAL LAW PRACTICE, *supra* note 14, § 21.1.

107. In the normal case, collateral attack must be initiated in the trial court. CAL. SUP. CT. & CTS. OF APP. R. 56.

108. In California, a defendant has no constitutional, statutory, or decisional right to counsel on collateral attack unless he "has stated facts sufficient to satisfy the court that a hearing is required." *People v. Shipman*, 62 Cal. 2d 226, 232, 397 P.2d 993, 997, 42 Cal. Rptr. 1, 5 (1965); see also *Ross v. Moffit*, 417 U.S. 600 (1974) (state defendant has no federal constitutional right to appointed counsel on discretionary appeal); *Douglas v. California*, 372 U.S. 353 (1963) (if state does provide for appeal as a matter of right, it must appoint counsel for indigent appellants).

remedy of appeal,¹⁰⁹ and vital witnesses or evidence may be lost during the interim. Finally, the general rule is that issues which could have been raised on appeal may not be raised by collateral attack,¹¹⁰ and the court may deem matters alluded to in the record to be matters which could have been raised.

Appellate Counsel's Duty Is To Collaterally Attack the Conviction During Pendency of the Appeal

To solve the problem described above, it should be the duty of appellate counsel to raise the issue while the appeal is pending, by filing a petition for an appropriate writ¹¹¹ in the appellate court in which the appeal is pending. A series of California cases establish the validity of this combined appeal-writ procedure.¹¹²

109. "[I]t is the practice of this court to require that one who belatedly presents a collateral attack such as this explain the delay in raising the question." *In re Swain*, 34 Cal. 2d 300, 302, 209 P.2d 793, 795 (1949). *In re Razutis*, 35 Cal. 2d 532, 536, 219 P.2d 15, 18 (1950) (waiver). *But see In re Ward*, 64 Cal. 2d 672, 414 P.2d 400, 51 Cal. Rptr. 272 (1966), (twenty year delay in collateral attack excused when issue involved was excessive punishment). Compare WITKIN, *supra* note 14, § 796 with *id.* § 717 (1963 & Supp. 1973).

110. See *In re Shipp*, 62 Cal. 2d 547, 399 P.2d 571, 43 Cal. Rptr. 3 (1965); *In re Dixon*, 41 Cal. 2d 756, 264 P.2d 513 (1953); *In re Domingo*, 268 Cal. App. 2d 642, 74 Cal. Rptr. 161 (1969). The courts often state that habeas corpus may not serve as a second appeal. See *In re Walker*, 10 Cal. 3d 764, 781, 518 P.2d 1129, 1138, 112 Cal. Rptr. 177, 187 (1974). *But see In re Osslo*, 51 Cal. 2d 371, 334 P.2d 1 (1958); *In re Bine*, 47 Cal. 2d 814, 306 P.2d 445 (1957). The writ is proper, however, when a defendant will have served his entire sentence before an appeal can be decided. See *In re Newbern*, 53 Cal. 2d 786, 350 P.2d 116, 3 Cal. Rptr. 364 (1960); *In re Solis*, 274 Cal. App. 2d 344, 78 Cal. Rptr. 919 (1969). A writ is also proper when appeal is not a plain, speedy and adequate remedy. See *In re Ali*, 230 Cal. App. 2d 585, 589, 41 Cal. Rptr. 108, 112 (1964); *In re Solis*, 274 Cal. App. 2d 344, 78 Cal. Rptr. 919 (1969). In certain situations, a writ will lie when constitutional rights are involved even though appeal was available and not utilized. See *In re Hochberg*, 2 Cal. 3d 870, 471 P.2d 1, 87 Cal. Rptr. 681 (1970). Finally, even if no constitutional right is involved, habeas corpus may be allowed in a case in which the issue was not raised when it could have been raised if "special circumstances" exist excusing the failure to raise the issue previously. See *In re Carmen*, 48 Cal. 2d 851, 313 P.2d 817 (1957).

111. The appropriate writ would normally be habeas corpus, but the name of the writ sought in the petition by appellate counsel is not crucial; the court will treat the document as a petition for the writ the court decides is appropriate. See WITKIN, *supra* note 14, § 771 (1973 Supp.).

112. See *People v. Lang*, 11 Cal. 3d 134, 520 P.2d 393, 113 Cal. Rptr. 9 (1974) (suggesting this procedure); *People v. Coleman*, 71 Cal. 2d 1159, 459 P.2d 248, 80 Cal. Rptr. 920 (1969); *People v. Langley*, 41 Cal. App. 3d 339, 116 Cal. Rptr. 80 (1974); *People v. Pena*, 25 Cal. App. 3d 414, 101 Cal. Rptr. 804 (1972) (suggesting this procedure); *People v. Rinegold*, 13 Cal. App. 3d 711, 92 Cal. Rptr. 12 (1971); *People v. Haynes*, 270 Cal. App. 2d 318, 75 Cal. Rptr. 800 (1969) (suggesting this procedure).

In *In re Hwamei*,¹¹³ court-appointed appellate counsel filed in the court in which the appeal was pending a petition for a writ of habeas corpus alleging inadequacy of trial counsel. Counsel decided to raise the issue by way of writ because, having found the record on appeal on the issue arguably insufficient to be meritorious, he wished to allege new facts outside that record. Over objection of the attorney general that the issue was already involved in the appeal and therefore not proper to be raised by writ,¹¹⁴ the court of appeal issued an order to show cause, stating that "[s]ince this fundamental issue is also the main issue raised on appeal, we have chosen to consolidate the habeas corpus proceeding with the appeal."¹¹⁵

The combined appeal-writ procedure was also used in *In re Miller*.¹¹⁶ Inadequacy of trial counsel was again the common issue. The attorney general argued that since the issue was raised in the appeal, it could not also be raised by writ. This argument was rejected, the court stating that since the record on appeal was not complete on that issue, "the only manner in which defendant can receive comprehensive appellate review of the basic constitutional issue he has raised is through habeas corpus proceedings."¹¹⁷ The judgment was reversed and the writ granted.¹¹⁸

In *In re Ali*¹¹⁹ the trial court had denied a continuance of the trial when defense counsel failed to appear owing to illness. Appellant was required to go to trial without counsel, was convicted, and appealed. Since the record on appeal did not contain all of the facts about counsel's illness, however, appellant sought relief by habeas corpus in the supreme court, which transferred the petition to the court of appeal to be consolidated with the pending appeal. Because the attorney general had unreasonably delayed in filing a reply brief on the appeal and because appellant "would remain imprisoned [wrongfully], pending the outcome of his appeal,"¹²⁰ the court of appeal granted the writ, stating

113. 37 Cal. App. 3d 554, 112 Cal. Rptr. 464 (1974).

114. See records, *In re Hwamei*, 37 Cal. App. 3d 554, 112 Cal. Rptr. 464 (1974).

115. 37 Cal. App. 3d at 557, 112 Cal. Rptr. at 465.

116. 33 Cal. App. 3d 1005, 109 Cal. Rptr. 648 (1973).

117. *Id.* at 1010, 109 Cal. Rptr. at 652.

118. The petition for the writ was originally filed in the supreme court during pendency of the automatic death penalty appeal. After abolition of that penalty in *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), the appeal and the petition for the writ were transferred to the court of appeal. See 33 Cal. App. 3d at 1008, 109 Cal. Rptr. at 651.

119. 230 Cal. App. 3d 585, 41 Cal. Rptr. 108 (1964).

120. *Id.* at 589, 41 Cal. Rptr. at 111.

that, "in the instant case, the remedy by appeal is neither speedy nor adequate."¹²¹

Nature and Advantages of the Writ Procedure in Appellate Courts

Within the limits described above, and within the rule that habeas corpus "may not be used instead of an appeal to review determinations of fact made upon conflicting evidence after a fair trial,"¹²² new facts can be presented by a petition for a writ to show that the record on appeal is not a complete record of the facts material to an issue and to show with particularity the procedural, substantive, or constitutional grounds that would compel a reversal.¹²³ A petition may be used to make a showing of appellant's innocence,¹²⁴ to point out errors undermining the guilt-finding process, and to demonstrate the unreliability of the judgment and the prejudice to appellant.¹²⁵ Within the limits mentioned, habeas corpus may be based on any grounds that could result in a reversal,¹²⁶ including inadequacy of trial counsel, invalidity of guilty pleas, and mental incapacity of the appellant at the time of the offenses.

The burden is on the petitioner to present a prima facie case for relief¹²⁷ on any asserted grounds, and he may do so by use of affidavits, records, or other documents.¹²⁸ As the situation in *In re Hwamei* demonstrates, this process affords appellate counsel a unique opportunity to retry the case in the appellate court.¹²⁹ If petitioner establishes a

121. *Id.* See also *In re Baird*, 150 Cal. App. 2d 561, 310 P.2d 454 (1957).

122. *In re Dixon*, 41 Cal. 2d 756, 760, 264 P.2d 513, 515 (1953).

123. See *In re Smith*, 2 Cal. 3d 508, 467 P.2d 836, 86 Cal. Rptr. 4 (1970); *In re Bell*, 19 Cal. 2d 488, 122 P.2d 22 (1942); CAL. PEN. CODE §§ 1473-74 (West 1970); cf. *Kaufman v. United States*, 394 U.S. 217 (1969); 28 U.S.C. § 2255 (1970).

124. For a peremptory writ to be issued on a claim of newly discovered evidence showing innocence, however, petitioner must show that the new evidence "will completely undermine" the prosecution's case and (1) "the new evidence is conclusive, and (2) it points unerringly to innocence." *In re Weber*, 11 Cal. 3d 703, 724, 523 P.2d 229, 243, 114 Cal. Rptr. 429, 443 (1974). But see *Whiteley v. Warden*, 401 U.S. 560 (1971) (Black, J., dissenting); Bines, *supra* note 9, at 958.

125. See, e.g., *In re Sturm*, 11 Cal. 3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974); *Smith v. Superior Ct.*, 68 Cal. 2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1968). See generally, Bines, *supra* note 9, at 958; Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1021 (1973).

126. See generally, WIRKIN, *supra* note 14, §§ 760, 764.

127. See *In re Smith*, 2 Cal. 3d 508, 467 P.2d 836, 86 Cal. Rptr. 4 (1970).

128. See *In re Saunders*, 2 Cal. 3d 1033, 472 P.2d 921, 88 Cal. Rptr. 633 (1970); *In re Bell*, 19 Cal. 2d 488, 122 P.2d 22 (1942).

129. Numerous materials describe methods for preparing the various writs and

prima facie case, an order to show cause (or alternative writ) is issued by the court,¹³⁰ requiring the state to file a return which may also contain affidavits, records, or other documents.¹³¹ A reply, called a traverse, may then be filed by petitioner.

If no triable issues of fact are raised by the petition, return, and traverse, the case will be decided on those documents without resort to a referee.¹³² Any triable issues raised by the documents and the record will be heard in an evidentiary hearing,¹³³ normally held before a superior court judge or a retired superior court judge.¹³⁴ Here, appellate counsel has a further unique opportunity to retry the case, this time with oral testimony.¹³⁵ Also, in appropriate cases, the appellate court itself may augment the facts before it. In *Hwamei*, for example, the court of appeal appointed two psychiatrists to examine the petitioner and, after reviewing their reports, granted the peremptory writ without an evidentiary hearing.

Pursuant to decisional and statutory law,¹³⁶ the referee at the evidentiary hearing considers conflicting evidence, including oral testimony, and renders to the appellate court a report containing findings of fact, conclusions of law, and a decision on the issues referred. Nevertheless, while the standard of review in a criminal appeal does not permit the appellate court to disturb findings of fact supported by substantial evidence, and resolves disputed facts in favor of the state,¹³⁷ the stan-

enumerate the grounds on which they may be granted. See SUP. CT. & CTS. OF APP. R. 56.5. See generally, 2 CALIFORNIA CRIMINAL LAW PRACTICE, *supra* note 14 §§ 21.1-.61; PRISON LAW PROJECT, A MANUAL ON HABEAS CORPUS FOR JAIL AND PRISON INMATES (1974); WITKIN, *supra* note 14, §§ 811-815 (1963); Granucci, *Review of Criminal Convictions by Habeas Corpus in California*, 15 HASTINGS L.J. 189 (1963).

130. *In re Hochberg*, 2 Cal. 3d 870, 471 P.2d 1, 87 Cal. Rptr. 681 (1970).

131. CAL. PEN. CODE § 1480 (West 1970); see, e.g., *In re Smith*, 2 Cal. 3d 508, 467 P.2d 836, 86 Cal. Rptr. 4 (1970).

132. *In re Saunders*, 2 Cal. 3d 1033, 472 P.2d 921, 88 Cal. Rptr. 633 (1970); see *In re Hwamei*, 37 Cal. App. 3d 554, 112 Cal. Rptr. 464 (1974) (peremptory writ granted without reference). *In re Waltreus*, 62 Cal. 2d 218, 397 P.2d 1001, 42 Cal. Rptr. 9 (1965) (writ denied without reference).

133. See *In re Weber*, 11 Cal. 3d 703, 523 P.2d 229, 114 Cal. Rptr. 429 (1974) (writ denied); *In re Hochberg*, 2 Cal. 3d 870, 873 n.2, 471 P.2d 1, 3, 87 Cal. Rptr. 681, 683 (1970) (writ granted). See generally WITKIN, *supra* note 14, § 824-26.

134. WITKIN, *supra* note 14, § 821.

135. CAL. PEN. CODE § 1484 (West 1970); see, e.g., *In re Branch*, 70 Cal. 2d 200, 443 P.2d 174, 74 Cal. Rptr. 238 (1969); *In re Lindley*, 29 Cal. 2d 709, 177 P.2d 918 (1947).

136. See CAL. PEN. CODE §§ 1483, 1484.

137. *People v. Bassett*, 69 Cal. 2d 122, 443 P.2d 777, 70 Cal. Rptr. 193 (1968); see generally WITKIN, *supra* note 14, §§ 683-85.

dard of review of the referee's report in habeas corpus is more favorable to the appellant-petitioner:

[A] referee's findings of fact are, of course, not binding on [the appellate] court, [which] may reach a different conclusion on an independent examination of the evidence produced at the hearing . . . even where the evidence is conflicting However, where the findings are supported by "ample, credible evidence" . . . or "substantial evidence" . . . they are entitled to great weight.¹³⁸

The standard of review available to a defendant-petitioner is more favorable to the defense than that available to a defendant-appellant. In the writ case, the court makes an independent examination of the record, whereas in the appeal, the court is bound by any substantial evidence supporting the judgment of conviction.¹³⁹ This difference suggests another reason for appellate counsel to invoke the writ remedy in conjunction with an appeal.

*Appellate Court Jurisdiction and Venue
of a Writ Proceeding*

With regard to the suggested unitary appeal-writ procedure, each California court of appeal and the state supreme court have original jurisdiction¹⁴⁰ to entertain the writ, and the supreme court has statewide venue, regardless of the residence or place of custody of the appellant-petitioner.¹⁴¹ It is questionable, however, whether the court of appeal where the appeal is pending is the proper venue for a petition for a writ filed by an appellant-petitioner who does not reside or is not in custody within the territory of that court of appeal. In this situation, some authorities have expressed the opinion that venue is not proper even though the appeal is pending in that court,¹⁴² based on cases holding that when no appeal is pending, venue for a petition for a writ is proper only in a court of appeal located in the same territory in which the petitioner is incarcerated.¹⁴³

138. *In re Branch*, 70 Cal. 2d 200, 203 n.1, 449 P.2d 174, 176, 74 Cal. Rptr. 238, 240 (1969); *accord, In re Hochberg*, 2 Cal. 3d 870, 873 n.2, 471 P.2d 1, 3, 87 Cal. Rptr. 681, 683 (1970).

139. See notes 137-38 *supra*.

140. "The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." CAL. CONST. art. VI, § 10. See *In re Hochberg*, 2 Cal. 3d 870, 873 n.2, 471 P.2d 1, 3, 87 Cal. Rptr. 681, 683 (1970).

141. CAL. PEN. CODE § 1508(a); WITKIN, *supra* note 14, § 792 (1963 & Supp. 1973).

142. See *In re Golias*, 16 Cal. App. 3d 775, 778, 94 Cal. Rptr. 323, 325 (1971); *In re Rinegold*, 13 Cal. App. 3d 723, 725 n.1, 92 Cal. Rptr. 18, 19 (1971).

143. See, e.g., *People v. Brady*, 30 Cal. App. 3d 81, 88 n.1, 105 Cal. Rptr. 280,

The viability of such authorities, however, is questionable. Prior to 1966, the California Constitution restricted a justice of a court of appeal to issuing writs of habeas corpus only within his appellate district.¹⁴⁴ In 1966, the constitution was amended, repealing the former sections and consolidating the writ power of the supreme court and the courts of appeal into one section, which contains no territorial limits on the habeas corpus power of the justices of the courts of appeal. At the same time, however, the legislature enacted California Government Code section 69109.¹⁴⁵ This section contained the restriction on writ power theretofore contained in the constitution. Finally, however, in 1969, Government Code section 69109 was itself repealed¹⁴⁶ and was replaced by California Penal Code section 1508,¹⁴⁷ which eliminated the territorial limitation on the power of the courts of appeal to issue writs but retained a limitation on those courts to make such writs heard ("returnable") only in the appellate district of the issuing court.¹⁴⁸ Thus, it can be argued that by repealing the limitation on issuing writs and retaining

284 (1973) (*coram nobis*); *People v. Bucchieri*, 2 Cal. App. 3d 842, 845, 83 Cal. Rptr. 221, 223 (1969) (*habeas corpus*); *People v. Williams*, 238 Cal. App. 2d 585, 595, 48 Cal. Rptr. 67, 74 (1966) (*habeas corpus* and *coram nobis*). These cases speak in terms of "jurisdiction," but the issue is one of venue, not jurisdiction. See note 140 & accompanying text *supra*.

144. Compare "The [district courts of appeal] shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus Each of the justices thereof shall have power to issue writs of habeas corpus to any part of his appellate district" CAL. CONST. art. VI § 46 (1947) (emphasis added) with "The [supreme court] shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus Each of the justices shall have power to issue writs of habeas corpus to any part of the State" *Id.* § 4 (1947) (emphasis added). Dicta in some cases, however, indicates that the geographic limitation did not restrict the power to issue the four named writs. See *Older v. Superior Ct.*, 157 Cal. 770, 772-74, 109 P. 478, 478-79 (1910) (dictum); *In re Mayen*, 49 Cal. App. 531, 543-45, 93 P. 813, 818-19 (1920) (dictum).

145. Former section 69109 read in part: "Each of the justices of the courts of appeal shall have power to issue writs of habeas corpus to any part of his appellate district" Cal. Stat., 1966, ch. 161, § 21 at 717, repealed Cal. Stat. 1969, ch. 38, § 2, at 145.

146. Cal. Stat. 1969, ch. 38, § 2, at 145.

147. "(a) A writ of habeas corpus issued by the Supreme Court or a judge thereof may be made returnable before the issuing judge or his court, before any court of appeal or judge thereof, or before any superior court or judge thereof. (b) A writ of habeas corpus issued by a court of appeal or a judge thereof may be made returnable before the issuing judge or his court or before any superior court or judge thereof located in that appellate district." CAL. PEN. CODE §§ 1508(a), (b) (West 1970).

148. Perhaps the purpose of this limitation is to prevent one appellate court from making work for another appellate court. This limitation is similar to the rule that one court of appeal lacks power to transfer a case to another court of appeal. CAL. SUP. CT. & CTS. OF APP. R. 20.

only a limitation on hearing writs, the legislature intended to give courts of appeal statewide venue in any writ case, whether filed alone or combined with an appeal.¹⁴⁹

No definitive resolution of this problem has been provided. Nevertheless, one recent case does support the contention that statewide venue exists. In *In re Hwamei*,¹⁵⁰ while an appeal was pending in the court of appeal, a petition for a writ was filed in that court, even though Hwamei was incarcerated in the judicial district of another court of appeal. The attorney general moved to dismiss the petition on the ground of improper venue. Nevertheless, the court of appeal issued an order to show cause. The attorney general then filed a petition for a writ of prohibition in the supreme court. The attorney general's petition was denied without opinion,¹⁵¹ and the writ was considered and ultimately granted by the court of appeal.

Furthermore, principles of sound judicial administration and common sense would place proper writ venue with the court of appeal where the appeal is pending, regardless of where appellant resides or is confined. If the petition were required to be filed with and heard by another court of appeal, the potential for inconsistent, overlapping, and duplicative decisions is apparent. Since the merits of the writ involve the validity of the conviction under review on appeal by the court of appeal, that court is obviously the court most familiar with the facts and the law of the case, and is therefore the court that should hear the petition. Moreover, the convenience of the state is best served by having the appeal and the writ consolidated in one appellate court and processed by only one office of the attorney general.¹⁵²

The California Supreme Court has adopted a procedure which avoids the potential problem of overlapping adjudication of similar issues. Petitions for a writ of habeas corpus filed with that court are often transferred¹⁵³ to the court of appeal in which the appeal is pending.¹⁵⁴ Logic would seem to dictate that a petitioner should be able

149. See 1971 JUDICIAL COUNCIL OF CALIFORNIA, REPORT TO THE GOVERNOR AND THE LEGISLATURE 23, 54-55; Horowitz, *Practitioner's Guide to California Habeas Corpus*, 8 J. BEVERLY HILLS B. ASS'N 10, 16 (1974).

150. 37 Cal. App. 3d 554, 112 Cal. Rptr. 464 (1974).

151. See note 114 *supra*.

152. See 1971 JUDICIAL COUNCIL OF CALIFORNIA, REPORT TO THE GOVERNOR AND THE LEGISLATURE 23, 51.

153. See CAL. CONST. art. VI, § 12.

154. See, e.g., *People v. Lang*, 11 Cal. 3d 134, 520 P.2d 393, 113 Cal. Rptr. 9 (1974); *In re Golia*, 16 Cal. App. 3d 775, 94 Cal. Rptr. 323 (1971); *In re Rinegold*, 13 Cal. App. 3d 723, 92 Cal. Rptr. 18 (1971).

to petition directly for a writ in the court in which the appeal is pending, as long as the supreme court allows the same result indirectly. In analogous situations, rules have been established allowing superior courts to transfer certain writs *from* the superior court in the territory where the defendant was confined and in which the petition was filed, *to* the original sentencing court in another county, because that court "normally is more familiar with the facts of the case. . . ." ¹⁵⁵ Unfortunately, however, under existing court rules and legislation, the court of appeal in which the petition for writ is filed does not possess the power to transfer the petition to another court of appeal, in which the appeal is pending. ¹⁵⁶

In order to clarify the situation regarding venue, the legislature should enact a provision clearly placing venue in the court of appeal in which the appeal is pending for writs filed attacking the conviction being appealed. Even under the present circumstances, however, it is submitted that writ venue is proper in the court in which the appeal is pending. If a petition is presented to a court other than that in which the appeal is pending, that court should refuse to file the petition, and should note in its order of refusal that proper venue lies in the court of appeal in which the appeal is pending. On the other hand, if the petition is presented to the court in which the appeal is pending, and that court refuses to file it because petitioner is not in custody or does not reside in its district, counsel should file the petition in the supreme court with a request that the petition be transferred forthwith to the court of appeal in which the appeal is pending. By following these suggested procedures, both counsel and the courts will promote efficient administration of justice and judicial economy.

Toward Unitary Post-Conviction Review

The suggested procedure for consolidating collateral attack with appeal is beneficial to the appellant because it provides, with the aid of counsel, a prompt and complete attack on the conviction, avoids the risks inherent in other approaches, and reduces the normally inordinate

155. *In re Haro*, 71 Cal. 2d 1021, 1025, 458 P.2d 500, 503, 80 Cal. Rptr. 588, 591 (1969); *see* *People v. Tenorio*, 3 Cal. 3d 89, 96 n.2, 473 P.2d 993, 997, 89 Cal. Rptr. 249, 253 (1970) (exercise of judicial discretion to dismiss a charged prior conviction which would affect sentencing); *In re Montgomery*, 2 Cal. 3d 863, 868, 471 P.2d 15, 18, 87 Cal. Rptr. 695, 698 (1970) (retroactive application of rule excluding use against defendant of the prior testimony of an "unavailable" witness). *But see* *Pope v. Superior Ct.*, 9 Cal. App. 3d 644, 88 Cal. Rptr. 488 (1970) (superior courts should not transfer to the original sentencing court a challenge to parole revocation).

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amount of time that elapses between sentencing and subsequent collateral attack. The procedure is beneficial to judicial administration because it tends to eliminate multiple, successive litigation¹⁵⁷ and the consequent drain on scarce judicial and legal resources. The procedure suggested by this article is analogous to, and consistent with, "unitary" post-conviction relief systems advocated by many sources.

The American Bar Association (ABA) proposes a standard involving a "unitary post-conviction remedy"¹⁵⁸ procedure which, while acknowledging the traditional rule that post-conviction relief should not be available until the appeal is concluded, advocates a "sufficiently flexible" system, which permits "postponed" appeals so that issues outside the record can be considered in a post-conviction proceeding prior to the appeal.¹⁵⁹ It also allows the post-conviction procedure to originate in the appellate court¹⁶⁰ and to consist of a unitary proceeding there involving both the appeal and the post-conviction attack.¹⁶¹

The ABA procedure allows counsel to seek comprehensive grounds for relief, unhindered by procedural or substantive restrictions common to writs.¹⁶² Those grounds include not only traditional bases for collateral attack, but also "evidence of material facts, not theretofore presented and heard, which require vacation of the conviction or sentence in the interest of justice."¹⁶³ Collateral attack on this latter ground is allowed because "there exists a close relationship between the factual issues that such motions raise and the other grounds for post-conviction relief."¹⁶⁴

Many commentators have also advocated a unitary post-conviction

157. Cf. *People v. Shuey*, 13 Cal. 3d 835, 533 P.2d 211, 120 Cal. Rptr. 83 (1975) (multiple appeals, law of the case, and res judicata).

158. ABA STANDARDS, *supra* note 21, § 1.4.

159. *Id.* § 2.2(b). In an Illinois case, the appellate court was faced with a direct appeal from a conviction and an appeal from denial by the trial court of a petition for post-conviction relief. The court of appeal vacated the direct appeal and stayed all proceedings therein while it reversed and remanded for a hearing in the post-conviction case. The court ordered the direct appeal reinstated when and if, after a hearing below, the post-conviction petition was dismissed and a new judgment of conviction entered. *People v. Garrett*, 26 Ill. App. 3d 786, 326 N.E.2d 143 (1975).

160. ABA STANDARDS, *supra* note 21, § 1.4.

161. *Id.* § 2.2, commentary.

162. *Id.* § 2.1.

163. *Id.* § 2.1(v).

164. *Id.* § 2.1, commentary. "The best course in that situation probably is to arrange postponement of the appellate review of conviction and sentence until the new issues are tried, in a post-conviction proceeding, if necessary. If relief is not granted, both actions can be consolidated for appeal." *Id.* § 2.2, commentary.

remedy procedure.¹⁶⁵ Numerous states have adopted some form of a unitary post-conviction act,¹⁶⁶ and the trend appears to be in that direction.¹⁶⁷ The California legislature has not adopted such a procedure, although it has been advocated and discussed.¹⁶⁸ Until some unitary procedure is adopted in California, the procedure suggested here is an acceptable vehicle for accomplishing the objectives of a unitary system.

Conclusion

In order to discharge the constitutional duty to provide adequate representation, appellate counsel must urge all arguable grounds for attacking a conviction. The primary avenue of attack is normally the appeal, which is limited to arguable issues contained in the record on appeal. Nonetheless, if the appellant is to receive the "comprehensive appellate review"¹⁶⁹ to which he is entitled, there should be neither restrictions limiting counsel's search for grounds for reversal solely to the record on appeal, nor restraints on his methods of seeking such reversal. Rather, counsel should be required to make a reasonable investigation of the entire case to determine if there are arguable grounds for reversal outside the record on appeal. At a minimum, this duty should require counsel to confer with appellant and trial counsel. Should this inquiry raise doubts as to the sufficiency of the record on appeal, a duty should arise to investigate further, and, when appropriate, to initiate concurrent collateral attack in the appellate court in which the appeal is pending.

Such a combined appeal-writ procedure provides appellant with a prompt and comprehensive attack on the conviction. It also conserves scarce judicial resources by bringing before one appellate court at an early stage all the potential grounds for reversal in one proceeding.

The resulting harm to appellant if appellate counsel fails to provide

165. See, e.g., Bines, *supra* note 9, at 977; Browning, *The Trial Courts: Some Comments from a Prosecutor*, 49 CALIF. ST. B.J. 447 (1974); Robinson, *Proposal and Analysis of a Unitary System for Review of Criminal Judgments*, 50 B.U.L. REV. 485 (1974).

166. See, ABA STANDARDS, *supra* note 21, app. C.

167. There is a similar trend toward "omnibus" pretrial proceedings. See, e.g., FED. R. CRIM. P. 17.1; R. NIMMER, THE OMNIBUS HEARING FINAL REPORT, AMERICAN BAR FOUNDATION REPORT, 45, 46 (Tentative Draft 1973); Myers, *The Omnibus Proceeding: Clarification of Discovery in the Federal Courts and Other Benefits*, 6 ST. MARY'S L.J. 386 (1974).

168. See *People v. Williams*, 238 Cal. App. 2d 585, 597, 48 Cal. Rptr. 67, 75 (1966); Note, *Post-Conviction Remedies in California Death Penalty Cases*, 11 STAN. L. REV. 94, 113-14, 118-19 (1958).

169. *In re Miller*, 33 Cal. App. 3d 1005, 1010, 109 Cal. Rptr. 648, 652 (1973).

adequate representation is affirmance of the conviction, rather than conviction itself. This consequence, however, is no less serious to appellant than the conviction, and it should be no less serious to our judicial system and sense of justice. Moreover, the harm to the attorney from inadequate appellate representation may be malpractice liability¹⁷⁰ or sanctions.¹⁷¹

There is a possibility that expanding the duty of appellate counsel may increase the instances of inadequate appellate representation. Since each instance of inadequate representation could require a court to

170. Inadequate appellate representation may give rise to a claim of malpractice against appellate counsel. *See generally*, Kaus & Mallen, *The Misguiding Hand of Counsel—Reflections on 'Criminal Malpractice'*, 21 U.C.L.A.L. REV. 1191 (1974); Note, *Liability of Court-Appointed Defense Counsel for Malpractice in Federal Criminal Prosecutions*, 57 IOWA L. REV. 1420 (1972); Note, *Right of the Indigent Client to Sue his Court-Appointed Attorney for Malpractice*, 33 LA. L. REV. 740 (1973); Note, *Improving Information on Legal Malpractice*, 82 YALE L.J. 590 (1973).

171. Like trial counsel in a criminal case, appellate counsel may be faced with a range of sanctions if he fails to provide adequate representation. *See* United States v. Rivera, 473 F.2d 1372 (9th Cir. 1972) (\$500 fine); United States v. Smith, 436 F.2d 1130 (9th Cir. 1970) (\$2,000 fine); Smith v. Superior Ct., 68 Cal. 2d 547, 560 n.5, 440 P.2d 65, 73, 68 Cal. Rptr. 1, 9 (1968) (public reproof); *In re McDermit*, 96 N.J. 17, 114 A. 144 (1921) (disbarment). The ABA Code of Professional Responsibility states that incompetent representation is a violation of the disciplinary rules. AMERICAN BAR ASS'N, CODE OF PROFESSIONAL RESPONSIBILITY DR-6-101 (1969). *See* Outcault & Peterson, *Lawyer Discipline and Professional Standards in California: Progress and Problems*, 24 HASTINGS L.J. 675, 693-96 (1973) (arguing that DR-6-101 should be narrowly construed).

A California case held that when both a defendant and his appointed trial counsel object, the trial court has no "statutory or inherent power" to relieve counsel on the ground that he is incompetent. *Smith v. Superior Ct.*, 68 Cal. 2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1965). California provides by statute: "The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows: 1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes; 2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other . . ." CAL. CODE CIV. PROC. § 284 (West 1970).

The supreme court has held that when trial counsel is improperly removed, the conviction must be reversed, regardless of the competency of the substituted counsel, the fairness of the trial, or the guilt of the defendant. *See* *People v. Crovedi*, 65 Cal. 2d 199, 417 P.2d 868, 53 Cal. Rptr. 284 (1966); *see also* *Chandler v. Fretag*, 348 U.S. 3 (1954). Of course, counsel's performance may cause an appellate court to inquire whether that "performance was such as to give petitioner good cause to have new counsel appointed." *In re Banks*, 4 Cal. 3d 337, 342, 482 P.2d 215, 219, 93 Cal. Rptr. 591, 595 (1971). If there is good cause and defendant requests that counsel be removed, the court may relieve counsel. *See* *People v. Marsden*, 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970); *cf. In re Ali*, 230 Cal. App. 2d 585, 589, 41 Cal. Rptr. 108, 111 (1964) (appellate counsel was relieved at request of petitioner even though the court regarded counsel's work as effective).

reinstate an appeal¹⁷² or to hear a writ, there is a potential increase in the burden on the judicial system. A similar result has been cited as one reason for the reluctance of courts to find trial counsel inadequate, since each instance of inadequate trial representation can require a new trial.¹⁷³ Nevertheless, the functional effect on the judicial system of a reinstated appeal is less than that of a new trial. Therefore, the slight increase in the burden on the judicial system which may result from expanding appellate counsel's duty should not deter courts from establishing such an expanded duty.

Hopefully, by fulfilling the duties as described in this article and by using the combined appeal-writ procedure for seeking a reversal, appellate counsel will minimize claims of inadequacy and will in fact provide the adequate representation required by the constitution.

172. Appeals were reinstated in the court of appeal in *United States ex rel. Johnson v. Vincent*, 370 F. Supp. 379 (S.D.N.Y. 1974); *People v. Lang*, 11 Cal. 3d 134, 520 P.2d 393, 113 Cal. Rptr. 9 (1974); *People v. Rhoden*, 6 Cal. 3d 519, 420 P.2d 1143, 99 Cal. Rptr. 751 (1972); *In re Smith*, 3 Cal. 3d 192, 474 P.2d 969, 90 Cal. Rptr. 1 (1970).

173. See Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 20-26 (1973).

